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No. 89-358

In the Supreme Court of the United States

OCTOBER TERM, 1989

GARY S. GILL, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

KENNETH W. STARR
Solicitor General
SHIRLEY D. PETERSON
Assistant Attorney General
GARY R. ALLEN
CHARLES E. BROOKHART
WILLIAM A. WHITLEDGE
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

Whether the courts below correctly rejected petitioner's contention that the enforcement of an IRS summons for the production of his business records would violate either the attorney-client privilege or his privilege against self-incrimination.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 16-20) is unpublished, but the decision is noted at 881 F.2d 1079 (Table). The opinion of the district court (Pet. App. 21-27) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 28, 1989. The petition for a writ of certiorari was filed on July 27, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner, an attorney who conducts his practice as a sole proprietorship, failed to pay his income tax liabilities for the years 1978-1984. The collection officer assigned to

collect those unpaid taxes issued an IRS summons to petitioner seeking a list of his accounts receivable and other documents reflecting petitioner's income, for the purpose of locating sources from which the outstanding liabilities could be collected. When petitioner refused to comply with the summons, the government filed this enforcement action in the United States District Court for the Southern District of Iowa. See Pet. App. 21-22.

The district court ordered the summons enforced, rejecting petitioner's blanket claims of attorney-client and Fifth Amendment privilege (Pet. App. 21-27). The court found that the identities of petitioner's clients and the amount of the fees they had paid were not "confidential professional communications protected by the attorney-client privilege" (*id.* at 24). The court explained that this information typically is not protected by the privilege unless it is shown that " 'a strong probability exists that disclosure of his clients' identity and the nature of his clients' fee arrangements would implicate said client in any criminal activity' " (*ibid.*, quoting *In re Grand Jury Proceedings Subpoena to Testify to: Wine*, 841 F.2d 230, 233 n.3 (8th Cir. 1988)). Petitioner's mere assertion that 10%-15% of his cases are criminal was not sufficient to establish a strong probability that disclosure of the information would reveal a confidential communication. Pet. App. 23-24. The court also found that production of the summoned financial records would not incriminate petitioner (*id.* at 24-26). The court explained that petitioner's "tax liability was determined by the IRS from the tax forms filed by the [petitioner] himself" and that he had admitted liability for the outstanding taxes (*id.* at 26).

2. The court of appeals affirmed (Pet. App. 16-20). The court agreed with the district court that there were no unusual circumstances present here that would warrant a departure from the general rule that client identity and fee arrangements are not confidential communications pro-

tected by the attorney-client privilege. Rather, the court concluded that petitioner "is using the attorney-client privilege as a shield to prevent the IRS from collecting taxes that he and his wife owe" (*id.* at 18-19). The court of appeals also rejected petitioner's assertion of the Fifth Amendment privilege against self-incrimination. Noting that petitioner had admitted his tax liabilities for the years under investigation on documents "which he voluntarily prepared and submitted to the IRS," the court of appeals concluded that the summons enforcement order did not compel him to "do anything that has testimonial aspects or will implicate him in any criminal wrongdoing" (*id.* at 19).

ARGUMENT

1. The court of appeals correctly found that the summons did not implicate petitioner's Fifth Amendment privilege against self-incrimination because his act of producing his business records had little testimonial significance and would not implicate him in any criminal wrongdoing (Pet. App. 19). Petitioner does not dispute that compliance with the summons would not tend to incriminate him; rather, his contention appears to be that the records of his sole proprietorship are private papers that are per se protected by the privilege under *Boyd* v. *United States*, 116 U.S. 616 (1886). See Pet. 3-6. This Court, however, has clearly rejected the view that the Fifth Amendment automatically protects an individual's private papers from a government request for production. Rather, the privilege protects only the testimonial aspects of the act of producing documents and not the contents of the documents themselves; any suggestion to the contrary in *Boyd* has been repudiated. *United States* v. *Doe*, 465 U.S. 605, 610 n.8 (1984); see generally *id.* at 610-613. Moreover, as the court of appeals noted (Pet. App. 19-20), petitioner raised the privilege merely to impede

the IRS's ability to collect taxes from him, not out of a fear that the records would incriminate him. Clearly, therefore, he did not raise a valid Fifth Amendment claim. See *Fisher* v. *United States*, 425 U.S. 391, 399 (1976).

2. There is no merit to petitioner's contention (Pet. 6-8) that enforcement of the summons would infringe the attorney-client privilege. It is well established that the attorney-client privilege does not generally protect the identity of a client or fee information. See *In re Grand Jury Proceedings Subpoena to Testify to: Wine*, 841 F.2d 230, 233 n.3 (8th Cir. 1988); *United States* v. *Davis*, 636 F.2d 1028, 1033-1034 (5th Cir.), cert. denied, 454 U.S. 862 (1981); *United States* v. *Hodge & Zweig*, 548 F.2d 1347, 1353-1354 (9th Cir. 1977). Petitioner does not suggest that there are any unusual and special circumstances present in this case that would make such information subject to the privilege. Here, the summons sought only ordinary business records of petitioner's practice, and not, as petitioner asserts (Pet. 8), his client files. Accordingly, the privilege that protects confidential communications between attorney and client made for the purpose of seeking or giving legal advice is not implicated by the summons in this case.

3. Petitioner also errs in contending (Pet. 8-12) that the district court should have held a hearing to resolve the merits of his claims of privilege. The general rule in summons enforcement cases is that, in order to be entitled to a hearing, the summoned party must raise issues of fact, supported by affidavit, sufficient to cast doubt upon the enforceability of the summons. See, *e.g.*, *United States* v. *Kis*, 658 F.2d 526 (7th Cir. 1981), cert. denied, 455 U.S. 1018 (1982); *United States* v. *Garden State Nat'l Bank*, 607 F.2d 61, 69-72 (3d Cir. 1979). As the court of appeals stated (Pet. App. 20), "[i]n enforcement proceedings such as this where there are no factual disputes and the district court determines that the defense asserted by the respondent is not legally sup-

portable, judgment on the pleadings is appropriate." Here, petitioner failed to provide any factual basis for his claims of privilege or any other ground for denying the summons enforcement petition. Accordingly, the district court acted well within its discretion in enforcing the summons on the record before it.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General
SHIRLEY D. PETERSON
Assistant Attorney General
GARY R. ALLEN
CHARLES E. BROOKHART
WILLIAM A. WHITLEDGE
Attorneys

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